Filed 2/11/19 Wood v. Wood CA2/7

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

CRAIG P. WOOD, Plaintiff and Appellant, v. SUZANNE WOOD, Defendant and Respondent.	B284247 (Los Angeles County Super. Ct. No. SD028486)

APPEAL from an order of the Superior Court of Los Angeles County, Patrick A. Cathcart, Judge. Affirmed in part, reversed in part, and remanded with directions.

Law Offices of Sondra S. Sutherland and Sondra S. Sutherland for Plaintiff and Appellant.

Elkins Kalt Weintraub Reuben Gartside and Thomas Paine Dunlap for Defendant and Respondent.

INTRODUCTION

Craig Wood appeals from a post-judgment order of the family law court that (1) ordered him to provide the court and his former spouse, Suzanne Wood, a monthly accounting of his gross income from all sources for the previous calendar month, (2) determined Craig owed $77,504.40 in spousal support arrears for the period May 2013 through October 2015, (3) ordered Craig to pay Suzanne $2,358 in monthly spousal support, and (4) ordered Craig to pay $20,301.56 in attorneys' fees.

Craig challenges all four components of the post-judgment order. We agree with him that issue preclusion prevented the family law court from determining his spousal support arrears for the period May 2013 through November 5, 2014 and that the court erroneously included $58,000 as income to him in determining his spousal support arrears for the period November 6, 2014 through October 2015. Therefore, we reverse the order and remand for a new determination on spousal support arrears that excludes the period May 2013 through November 5, 2014 and the $58,000 as income to Craig during the subsequent period. We affirm the order in all other respects.

FACTUAL AND PROCEDURAL BACKGROUND

A. *The Pendente Lite Spousal Support Orders*

Craig and Suzanne had been married 29 years and had no minor children when, in May 2010, Craig filed a petition for dissolution of the marriage. Craig was 57 years old and a partner at a large Los Angeles law firm, where he specialized in real

estate transactions. Suzanne was 58 years old and had been unemployed since the 1980s.

In April 2011 the family law court found that from November 2010 through January 2011 Craig had a gross base monthly salary of $21,000, and the court ordered him to pay monthly spousal support of $4,708 for that period. The court found that, beginning February 2011, Craig had a gross base monthly salary of $20,000, and the court ordered him to pay monthly spousal support from that date of $4,495. The court also ordered Craig to make an "*Ostler-Smith* payment" of 23 percent of any additional gross monthly employment income he received in excess of the gross base salary amounts the court had specified.[1]

In November 2012 the family law court granted Craig's request to reduce his monthly spousal support payment to zero. The court granted the request based on Craig's declaration that in September 2012 the law firm where he worked terminated his partnership and employment, that he now operated a solo practice as "Craig P. Wood, A Professional Law Corporation," but that, as yet, he had no clients or income. In January 2013 the

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[1] A family law court may award as spousal or child support "'a percentage of uncertain earnings,'" such as bonuses or sales commissions, in order to avoid "'an indefinite number of future hearings at which the details of income, expenses, investment success or failure, tax consequences and fairness must be reevaluated.' These awards are referred to as '*Ostler-Smith*' payments after *In re Marriage of Ostler & Smith* (1990) 223 Cal.App.3d 33, 42." (*In re Marriage of Usher* (2016) 6 Cal.App.5th 347, 352, fn. 3; see *In re Marriage of Samson* (2011) 197 Cal.App.4th 23, 27.)

family law court modified its spousal support order: "To the extent that he has income coming in between now and the time of trial, [Craig] is directed to notify [Suzanne] of that within 24 hours of the receipt of the income. As soon as the money is available to [Craig] he is ordered to pay [Suzanne] 20 percent of the gross amount towards the pendente lite spousal support obligation."

B. *The Statement of Decision After Trial and the Ruling on Objections to the Statement of Decision*

Trial occurred between March 11 and March 25, 2013. Disputed issues included whether Suzanne should receive spousal support, if so how much, and whether, as Suzanne contended, Craig owed spousal support arrears for the period March 17, 2010 to September 11, 2012. In May 2013 the family law court issued a 62-page proposed statement of decision, to which the parties filed objections. On August 14, 2013 the court issued a 17-page ruling on the objections, in which the court stated it was adopting its proposed statement of decision, "as clarified and ruled upon in this document," as its final statement of decision.[2]

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[2] With its ruling on the objections, the court issued a 62-page "Statement of Decision" that in all relevant respects appears to be identical to the court's previous, 62-page "Proposed Statement of Decision." We will therefore refer to the court's "statement of decision" without distinguishing between these two 62-page documents. But we do mean the term to refer to those documents, as distinct from the court's written ruling on the parties' objections.

The statement of decision included findings that, although Craig "made efforts to build a law practice" after separating from his former law firm, he had thus far "earned minimal income as a sole practitioner" and that, although Craig's "IRS Form 1040 for 2012 . . . shows adjusted gross income of $363,005[,] . . . his corporate tax return for his Professional Law Corporation . . . showed zero income for 2012 after his separation" from his former law firm. The court found that Suzanne's "earnings capacity was significantly impaired" because she had not worked outside the home since 1985, but that, after working 9 to 12 months as an unpaid volunteer at a non-profit organization, she should be able to re-enter the job market by May 2015. The court found Suzanne did not prove her allegation Craig owed spousal support arrears.

The statement of decision also addressed the factors in Family Law Code section 4320. In discussing these factors, the court stated: "[Craig] should be able to pay Spousal Support but currently he does not have income sufficient for the Court to order a specific amount. There is also not sufficient evidence to immediately impute income to [Craig]. As a result, the Court will order that [Craig] pay 20% of his gross income from all sources to [Suzanne]. This is consistent with the prior order of [the judge who issued the January 2013 pendente lite support order]. [Craig] will also be ordered to account to the Court by the 15th of every month with a Declaration under Penalty of Perjury concerning his gross income from all sources for the calendar month preceding the 15th of the month when he reports."

The court concluded its discussion of spousal support in the statement of decision by ordering Craig "to pay monthly Spousal Support to [Suzanne] in an amount equal to 20% of his adjusted

gross monthly income from all sources." The court also ordered "that each month commencing on May 31, 2013, [Craig] shall do the following: [¶] (a) Each month . . . until further order of the Court, he will calculate his gross income from all sources; [¶¶] (c) [Craig] is ordered to pay to [Suzanne] an amount equal to 20% of his adjusted gross income from all sources, payable by the 15th day of the following month; [¶] (d) By way of example, he is to calculate his adjusted gross income as of May 31, 2013 from all sources and pay 20% of that amount to [Suzanne] by June 15, 2013; [¶] (e) The Court orders [Craig] to provide [Suzanne] with his 2013 federal and state income tax returns on or before May 15, 2014. The percentage of gross monthly income payable for Spousal Support will be recalculated based on the income reported in [Craig's] tax return. . . . ; [¶¶] (f) [Suzanne] may file a Request for Order requesting the Court set a specific monthly [amount] of Spousal Support; [¶¶] (h) This order is based upon [Craig's] corporate tax return for 2012 which shows zero income. [Suzanne] has not produced evidence to establish that [Craig] is able to pay a specific amount per month based on his income."

In its ruling on the objections, the court addressed Craig's request "that the Court order him to pay 20% of his earned income from employment, net of expenses, and [for] an allowance for a reasonable reserve exclusive of any unrealized passive income." The court stated: "The Court defines 'income' as 'adjusted gross income' after deduction of reasonable business expenses as set forth in [Craig's] federal and state income tax returns. [¶] The Court allows a reasonable reserve to pay monthly expenses of [Craig's] law firm. This reserve is not to exceed one month's expenses . . . ." The court concluded its ruling

on the objections by directing Craig "to prepare a Judgment consistent with the terms of the Final Statement of Decision."[3]

C. *The Judgment*

On December 30, 2013 the family law court entered a judgment, consisting of a two-page judgment form and a 17-page attachment prepared by Craig.[4] The court crossed out some provisions in the attachment and at the end of the document wrote, by hand, "The court incorporates the 62 page statement of decision issued 8-14-13 and the 17 page ruling of 8-14-13 on the parties objections."

The judgment required Craig to "pay monthly spousal support to [Suzanne] in an amount equal to twenty percent (20%) of [Craig's] Adjusted Gross Income, if any, commencing on June 15, 2013, for each calendar month during the period commencing May 1, 2013." The judgment stated this support order was "made without prejudice to either [Craig] or [Suzanne] to file a Request for Order Post-Judgment to modify Monthly Spousal Support to establish a fixed amount of monthly spousal support based upon either party's earnings history since the entry of a final Judgment in this matter. Accordingly, if there has been a

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[3] Immediately following this sentence, the court wrote: "[Craig] is ordered to prepare a Judgment consist[ent] with the Statement of Decision set forth on May 28, 2013, as clarified and ruled upon in this document. This document and the Statement of Decision of 05-28-2013 shall constitute the Court's Final Statement of Decision."

[4] References to the text of the judgment are to this 17-page attachment.

substantial or material change of circumstances, including, for example, a material or substantial change in the earnings history of either [Craig] or [Suzanne], either party may file a Request for Order Post-Judgment requesting that monthly spousal support be fixed in amount rather than be calculated on the basis of a percentage of [Craig's] Adjusted Gross Income."

The judgment also defined "Adjusted Gross Income" as "all gross income earned by [Craig] in any calendar month from all sources, reduced by all of the following: (i) all the ordinary and necessary expenses paid or incurred by [Craig] in carrying on any trade or business, including, without limitation, [Craig's] law practice and any other trade or business owned or operated by [Craig], as set forth in [Craig's] federal and state income tax returns . . . ; plus (ii) a reasonable reserve for ordinary and necessary expenses that may be paid or incurred by [Craig] in carrying on any trade or business, including, without limitation, [Craig's] law practice and any other trade or business owned or operated by [Craig], up to an amount not to exceed expenses for one calendar month based upon [Craig's] average monthly expenses paid or incurred during any twelve (12)-calendar month period, subject to replenishment, in whole or in part, in any calendar month during which funds held in reserve are used to pay expenses in any calendar month where expenses may exceed income, as all set forth in any documentation required to be submitted by [Craig] to [Suzanne] for any calendar month from and after May 2013."

In addition to requiring the parties to exchange copies of their tax returns each year (beginning with their returns for 2013), the judgment required that, "[f]or any month in which [Craig] owes [Suzanne] a payment of Monthly Spousal Support,

on or before the 15th day of any applicable calendar month, along with any such payment of Monthly Spousal Support, [Craig] shall deliver to [Suzanne] . . . a statement setting forth in reasonable detail [his] gross income and expenses for the preceding calendar month, and amounts set aside as a reserve during such preceding calendar month, together with a calculation of the amount of Monthly Spousal Support to be paid by [Craig] to [Suzanne] for such calendar month, but only so long as Monthly Spousal Support to be paid by [Craig] to [Suzanne] shall be calculated on the basis of a percentage of [Craig's] Adjusted Gross Income."

Finally, the judgment provided that, beginning May 1, 2015, "income shall be imputed to Suzanne in the amount of $29,000 per year . . . regardless of whether or not [she] actually is employed. The Court gives [Suzanne] two (2) years to prepare to enter the work force." Neither party appealed from the judgment.

D. *Suzanne's May 2014 and October 2014 Requests for Orders*

In May 2014 Suzanne filed a request for an order (the May 2014 RFO) seeking, among other things, to determine Craig's spousal support arrears from May 1, 2013 and to modify the judgment's reporting requirements to require Craig to provide Suzanne a monthly accounting of his gross income and expenses and a calculation of the spousal support to be paid, if any. In her supporting declaration, Suzanne asserted she had not received any spousal support from Craig before or after entry of the judgment, but claimed his professional law corporation's 2013 tax return reflected "minimum earnings of $194,151" for that year. She argued: "Since [Craig], at time of trial, claimed to have no

earnings from his [business], these earnings must have been during the . . . time period [between May 1 and December 31, 2013,] and I would be entitled to a minimum of $38,830 for the stated time period." Suzanne also stated she was serving Craig with discovery to obtain bank statements and other financial documents.

In a responsive declaration Craig asserted that at trial he stated he was providing legal services to a client "for which he anticipated payment . . . when and in the amount that the client elected to pay" him and that he (fortuitously) "received payment for those services in April 2013 after conclusion of the trial and before [he] was required by the Judgment to account for and pay over any portion of his Adjusted Gross Income to [Suzanne], and at a time when [he] was not subject to any court order requiring the payment of spousal support to [Suzanne]." (Emphases omitted.)

In October 2014, with her May 2014 RFO still pending, Suzanne filed another request for an order (the October 2014 RFO), this time seeking, among other things, a determination of Craig's spousal support arrears back to January 1, 2013. Suzanne observed that the family law court did not modify its January 2013 pendente lite support order, which required Craig to pay Suzanne "20 percent of the gross" of any income he received between then "and the time of trial," until the court entered judgment in December 2013, making (in the judgment) a support order that was effective May 1, 2013. Suzanne argued the income Craig claimed to have received in April 2013 was therefore subject to the January 2013 pendente lite support order. Craig does not appear to have filed any responsive document to this request.

On November 5, 2014 the family law court heard Suzanne's May 2014 RFO and October 2014 RFO and denied both. Regarding the determination of arrears, argument focused on the accuracy of Craig's trial testimony concerning his income and the timing of the income his law practice received in 2013. At the conclusion of the hearing, the court stated, "I have no evidence on which to make a finding that there was income received after May 1, 2013 during 2013. Suspicious as it may seem, I can't make that finding so I am going to deny the request for order."[5] Neither party appealed these rulings.

E. *Suzanne's June 2015 Request To Hold Craig in Contempt*

In June 2015 Suzanne filed a request for an order to show cause for contempt, contending Craig was in violation of the monthly income-reporting requirements provided for in the judgment. The family law court heard the matter in July 2015 and, finding Suzanne had not met the notice requirements for a contempt proceeding, discharged the order to show cause. The court also cited a provision in the judgment stating "reporting is only necessary if there is money to be paid as spousal support" and added, "I don't find that there is any basis for finding contempt for that. It may be that you need to do some discovery

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[5] The court's suspicion regarding the timing of the payment Craig received in April 2013, and his claim it fell conveniently in what he argued was a gap between the temporary and final spousal support orders, was justified. The court, however, did not address Suzanne's argument that any income Craig received in April 2013 was subject to the January 2013 pendente lite support order.

to find out the information on which there may be a claim for arrears."

F. *Suzanne's July 2015 Request for an Order*

In July 2015, on the same day the family law court heard the order to show cause for contempt, Suzanne filed another request for an order (the July 2015 RFO) to modify spousal support, asking the family law court to do two things: set a specific monthly amount of spousal support and require Craig to provide her with monthly reports setting forth his gross income and the calculation of his adjusted gross income after deduction of reasonable business expenses. Regarding the former, Suzanne cited the provision in the judgment that permitted the parties to file a post-judgment request for an order setting a fixed amount of monthly spousal support. In her supporting declaration, Suzanne stated she still had not received any spousal support from Craig or any reports setting forth his gross and adjusted gross monthly income. She argued the current spousal support order was "simply *not* working" because she was "completely in the dark," with Craig refusing to provide any documents to prove her claims to support and arrears.

In August 2015 the parties appeared for a hearing on the request. Suzanne began the hearing represented by counsel, but when Craig produced evidence that Suzanne's attorney had previously represented him in this case, the attorney withdrew, and Suzanne represented herself. She requested a continuance, which the court granted. Before adjourning, the court, noting the judgment provided for modifying spousal support to a fixed amount based on either party's post-judgment earnings history, stated: "The problem is with the information that [Suzanne]

would need to be able to know if there is any fixed amount of income that would be able to be paid, and that is because the reporting language that requires reports is somewhat ambiguous in the court's mind. So . . . if you wish to have a continuance, I will do that, but I am going to order tentatively that the judgment be modified to require a monthly report of adjusted gross income from [Craig] given to [Suzanne]. . . . [T]hat is going to be my tentative for the hearing."

Craig then objected to the tentative ruling, arguing that the court previously found at the hearing on the order to show cause that he "only had to produce reporting in those months during which spousal support was due" and that modifying the judgment on this point was "uncalled for" because "there is no ambiguity." The court reiterated its tentative ruling, scheduled the continued hearing for October 2015, and told Suzanne: "I am going to suggest strongly that you retain an attorney. The attorney may want to come in and request attorneys' fees."

The court continued the hearing on Suzanne's July 2015 RFO several more times, during which period Suzanne served Craig with requests for production of documents, and Craig's accountant and two of his banks with subpoenas, seeking information concerning Craig's income and expenses. On January 25, 2016 the court heard a motion by Suzanne to compel Craig to respond to her discovery requests and a motion by Craig to quash the subpoenas on the banks. The court granted Suzanne's motion to compel, denied Craig's motion to quash, and sanctioned Craig $2,500 in connection with the motion to compel. The court also took Suzanne's July 2015 RFO off calendar, with the stated intention of re-calendaring it when the parties notified the court that discovery was complete. The court also pointed out

the ambiguity in the judgment's reporting requirements owing to the variance between the statement of decision's provision that Craig file a monthly report and what the attachment to the judgment stated.

G. *Suzanne's September 2016 Request for an Order*

In September 2016 Suzanne filed a request for an order (the September 2016 RFO) asking the family law court to re-calendar the July 2015 RFO, determine Craig's spousal support arrears from May 2013 to October 2015, and award Suzanne approximately $19,500 in attorneys' fees and costs. Pursuant to a stipulation between the parties, the family law court calendared the July 2015 RFO and all other pending matters for hearing on December 12, 2016.

H. *The Hearing and Rulings on the July 2015 and September 2016 RFOs*

The hearing on the July 2015 and September 2016 RFOs took place over three days in December 2016. Suzanne was represented by counsel, and Craig represented himself. Both testified, as did Craig's accountant, Sharon Gilday. At the conclusion of the hearing the family law court took the matter under submission and later issued a tentative statement of decision. In May 2017, after considering objections to and proposals for the statement of decision, the court issued its final statement of decision.

The court addressed four issues. First, recognizing the statement of decision after trial required Craig to file a monthly accounting of his gross income while the judgment only required him to provide Suzanne a statement of his gross income,

expenses, and reserves in months in which he owed spousal support, the court found the provision in the statement of decision controlling. The court therefore ordered Craig to begin providing the court with a monthly accounting of his gross income and to provide a copy to Suzanne.

Second, based on its review of the documentary evidence produced during discovery and submitted to the court, including bank statements showing transfers from Craig's professional account to his personal bank accounts and the payment of expenses from the latter, the family law court found that from May 2013 through October 2015 Craig's "law practice received income that was transferred to [his] personal checking and savings accounts" in the amount of $387,522. Noting the judgment ordered Craig to pay "20% of that gross income" in spousal support, the court concluded Craig owed $77,504.40 in arrears for May 2013 through October 2015 and directed counsel for Suzanne "to provide a calculation on Executioner of the interest for that amount of arrears."[6] The court rejected Craig's argument that "a determination of arrears [was] an 'impermissible collateral attack'" on the court's previous rulings because Craig had raised this argument for the first time in his objections to the proposed statement of decision "and did not raise the issue even during closing argument (which would have been too late in any case)."

Third, the court addressed Suzanne's request for a fixed amount of monthly spousal support. The court determined that

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6 Executioner is the brand name of a computer software product used to determine, among other things, the interest accrued on support arrears.

Craig's average "monthly income" from November 2015 through September 2016 was $11,790 and that this was "a reasonable time period and calculation for [Craig's] income based on the evidence presented to the Court." The court then considered other relevant circumstances under Family Code section 4320, including that Craig lived in a 1,900 square foot rental home on 33 acres in "Pacific Palisades/Malibu" (100 yards from the ocean), had "a substantial retirement account of approximately $537,000 and . . . a substantial income from the practice of law," and reported average monthly expenses of $14,248.86, while Suzanne had (non-support) monthly income of $1,064, lived in a van she parked in public spaces at night, and suffered from a number of diagnosed physical ailments that kept her from sitting or standing for more than 15 minutes at a time. Finding Suzanne had a need for a fixed amount of spousal support and Craig had the ability to pay, the court concluded: "A spousal support award based upon the previously ordered 20% of gross income, and based upon the Court's findings upon the evidence admitted in this proceeding, is $2,358 per month."

Finally, the court found the evidence supported Suzanne's request for reasonable attorneys' fees and costs. The court stated, "Prior to the hearing on this RFO, [Suzanne] was not represented by counsel in the past few months, and clearly was disadvantaged by not being represented. [Craig], a lawyer (although not, apparently, a litigator by trade) was greatly advantaged, and had the services of a CPA . . . . [Suzanne] clearly had a need to have representation. [Craig] has the ability to pay, and, under Family Code § 2032(c) has funds in his retirement account with which to make a contribution . . . to

counsel for [Suzanne]." The court ordered Craig to pay counsel for Suzanne $20,301.56.

On July 13, 2017 the family law court entered, consistent with its final statement of decision, its findings and order after hearing. In this document the court (1) ordered Craig to "provide an accounting to the Court, with a copy to [Suzanne], by the 15th of every month with a Declaration under Penalty of Perjury concerning his gross income from all sources for the calendar month preceding the 15th of the month when he reports"; (2) found that "spousal support arrear[s] in the principal sum of $77,504.40 are due and owing by [Craig] to [Suzanne] for the period of May[ ] 2013 through October[ ] 2015" and ordered counsel for Suzanne to "provide a calculation on 'Executioner' of the interest due and owing on said arrear[s]"; (3) ordered Craig to "pay spousal support to [Suzanne] in the amount of $2,358.00 per month," which the court stated "is based upon the previously ordered 20% of [Craig's] gross income and upon the Court's findings on the evidence admitted in this proceeding"; and (4) ordered Craig to pay $20,301.56 to counsel for [Suzanne]." Craig timely appealed, challenging all four rulings.

DISCUSSION

A. *The Doctrine of Disentitlement Does Not Support Dismissal of Craig's Appeal*

As an initial matter, Suzanne has moved to dismiss Craig's appeal under the doctrine of disentitlement. Under that doctrine "[a]n appellate court has the inherent power to dismiss an appeal by a party that refuses to comply with a lower court order. [Citation.] This doctrine of disentitlement is not jurisdictional, but is a discretionary tool that may be used to dismiss an appeal

when the balance of the equitable concerns makes dismissal an appropriate sanction. [Citation.] The rationale underlying the doctrine is that a party to an action cannot seek the aid and assistance of an appellate court while standing in an attitude of contempt to the legal orders and processes of the courts of this state. [Citation.] No formal judgment of contempt is required under the doctrine of disentitlement. [Citation.] An appellate court may dismiss an appeal where the appellant has willfully disobeyed the lower court's orders or engaged in obstructive tactics." (*Gwartz v. Weilert* (2014) 231 Cal.App.4th 750, 757-758, fn. omitted; accord, *Ironridge Global IV, Ltd. v. ScripsAmerica, Inc.* (2015) 238 Cal.App.4th 259, 265.)

Suzanne argues the doctrine applies here because Craig has paid none of the spousal support arrears or attorneys' fees and only "a maximum of $282.69" of the current monthly spousal support payments required by the order he is appealing. Craig does not deny he has paid virtually nothing pursuant to the order, but argues he is not in contempt of the order and has not engaged in willful disobedience or obstructive tactics. On the contrary, he maintains, he "has made an earnest effort to pay the support ordered to the extent of his financial ability."

We reach no conclusions at this point regarding the earnestness of Craig's "effort" or the "extent of his financial ability" to pay spousal support, but we agree Suzanne has not shown Craig has engaged in the kind of egregious behavior that would justify exercising our discretion to dismiss his appeal under the disentitlement doctrine. In their supporting declarations neither Suzanne nor her attorney suggests either of them has taken any steps to enforce the order in question, let alone shown Craig has resisted such an attempt. That

distinguishes this case from the case on which Suzanne relies that dismissed a husband's appeal from a judgment of divorce where he failed to pay alimony and attorneys' fees as ordered. (See *Kottemann v. Kottemann* (1957) 150 Cal.App.2d 483, 484-486 [appellant's whereabouts remained unknown after he fled to avoid efforts to serve him with an order to show cause regarding contempt and took other measures to frustrate respondent's attempts to enforce the ordered payments].)[7] Therefore, we deny Suzanne's motion to dismiss the appeal and proceed to the merits.

B. *The Family Law Court Erred in Part in Determining Craig's Arrears*

Craig makes three challenges to the family law court's determination he owed Suzanne $77,504.40 in spousal support arrears. First, he contends the doctrine of issue preclusion prevented the court from determining his arrears for the period May 2013 to November 5, 2014.[8] Second, he contends that in determining his arrears after November 5, 2014 the family law court did not correctly apply the judgment's provision requiring him to pay 20 percent of his "adjusted gross income," as the

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[7] Suzanne does not cite this case directly. She quotes another case, *Ironridge Global IV, Ltd. v. ScripsAmerica, Inc.* (2015) 238 Cal.App.4th 259, that cites and describes the *Kottemann* case. (See *Ironridge*, at p. 266.)

[8] Craig refers to the doctrine as "collateral estoppel," but we follow the Supreme Court's preference for the term "issue preclusion." (See *DKN Holdings LLC v. Faerber* (2015) 61 Cal.4th 813, 824.)

judgment defined that term. Third, he contends the court erred in ordering counsel for Suzanne to calculate the interest due on the arrears. We agree with Craig's first contention, disagree with the second—except that the court should not have included $58,000 in retirement funds as income to Craig—and disagree entirely with the third.

1. *Standard of Review*

We generally review spousal support orders, including those determining arrears, "under the deferential abuse of discretion standard. [Citation.] We examine the challenged order for legal and factual support. 'As long as the court exercised its discretion along legal lines, its decision will be affirmed on appeal if there is substantial evidence to support it.' [Citations.] 'To the extent that a trial court's exercise of discretion is based on the facts of the case, it will be upheld "as long as its determination is within the range of the evidence presented."' [Citation.] [¶] Where a question of law is presented on undisputed facts, appellate review is de novo." (*In re Marriage of Blazer* (2009) 176 Cal.App.4th 1438, 1443; see *In re Marriage of Judd* (1977) 68 Cal.App.3d 515, 525 ["[t]he trial court's discretion in this area [of determining spousal support arrears] is unquestioned"]; *Spivey v. Furtado* (1966) 242 Cal.App.2d 259, 265 ["this court cannot interfere with [the trial court's] decision [not to allow credit against support arrears] unless credit is allowable as a matter of law or there was an abuse of judicial discretion"].) We also apply "the well-established rule that '[a] judgment or order of a lower court is presumed to be correct on appeal, and all intendments and presumptions are indulged in favor of its correctness.'" (*In re Marriage of Ackerman* (2006) 146

Cal.App.4th 191, 197; see *In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133.)

2. *Issue Preclusion Prevented the Family Law Court from Determining Arrears for the Period May 2013 through November 5, 2014*

"'At its most fundamental, "[i]ssue preclusion, or collateral estoppel, "'precludes *relitigation* of issues argued and decided in prior proceedings,'"'" and it "applies only if all of the following conditions are met: (1) the issue is identical to an issue decided in a prior proceeding; (2) the issue was actually litigated; (3) the issue was necessarily decided; (4) the decision in the prior proceeding is final and on the merits; and (5) the party against whom collateral estoppel is asserted was a party to the prior proceeding or in privity with a party to the prior proceeding." (*Robinson v. U-Haul Co. of California* (2016) 4 Cal.App.5th 304, 321 (*Robinson*).)[9] Whether issue preclusion applies "is a question of law reviewed de novo." (*Robinson*, at p. 321.)

Craig argues issue preclusion barred the family law court from determining arrears for the period May 2013 through November 5, 2014 because the court had already ruled against Suzanne on that same issue on November 5, 2014, when the court denied her May 2014 and October 2014 RFOs. Suzanne concedes the doctrine applied, just as Craig says it did, to prevent the

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[9] Suzanne concedes issue preclusion can apply not only to issues decided in a previous action, but to those previously decided in the same action, and a number of cases support that proposition. (See, e.g., *In re Daniel D.* (1994) 24 Cal.App.4th 1823, 1832-1833; *Estate of Anderson* (1983) 149 Cal.App.3d 336, 346.)

parties from relitigating the issue of arrears from May 2013 through November 5, 2014 and to preclude "the entry of orders related thereto." She argues, however, Craig forfeited this argument by not properly raising it before the family law court. He did not forfeit it.

"'As a general rule, theories not raised in the trial court cannot be asserted for the first time on appeal; appealing parties must adhere to the theory (or theories) on which their cases were tried. This rule is based on fairness—it would be unfair, both to the trial court and the opposing litigants, to permit a change of theory on appeal.'" (*Nellie Gail Ranch Owners Assn. v. McMullin* (2016) 4 Cal.App.5th 982, 997; see *In re Marriage of Harris* (2007) 158 Cal.App.4th 430, 440 ["[n]ew theories of defense may not be raised for the first time on appeal"].)

Although Craig does not appear to have used the labels "issue preclusion," "collateral estoppel," or "res judicata" in the course of opposing Suzanne's September 2016 RFO, he did raise the issue in the family law court. His memorandum of points and authorities in opposition to Suzanne's September 2016 RFO contained the heading "THIS COURT PREVIOUSLY DENIED [SUZANNE'S] REQUEST FOR ORDER SEEKING DELINQUENT SPOUSAL SUPPORT FOR THE SAME TIME-PERIOD COVERED BY [THIS] RFO." Underneath that heading Craig argued: "In 2014, [Suzanne] filed two Requests for Orders seeking, among other things, purportedly delinquent Monthly Spousal Support. In ruling on those RFOs, the Court denied [Suzanne's] request for payment of delinquent Monthly Spousal Support for the period commencing January 1, 2013 and ending November 5, 2014. . . . [¶¶] [This] RFO is duplicative. The [May 2014] RFO and [October 2014] RFO seek the same purportedly

delinquent Monthly Spousal Support for the period January 1, 2013 through November 5, 2014. Under the doctrine of law of the case, this Court should not now grant relief on the exact same issues previously litigated and ruled upon by this Court." This argument, tracking the language and expressing the gist of the elements of issue preclusion, sufficiently preserved the issue.

Moreover, "there is a recognized exception to [the forfeiture] rule for pure questions of law on uncontroverted records that require no factual determinations." (*In re Marriage of Harris*, *supra*, 158 Cal.App.4th at p. 440; see *In re Marriage of Priem* (2013) 214 Cal.App.4th 505, 511 [the exception applies "where the theory presented for the first time on appeal involves only a legal question determinable from facts which not only are uncontroverted in the record, but which could not be altered by the presentation of additional evidence"]; Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2010) ¶ 8:237, p. 8-174 ["[i]n these circumstances, there is no 'unfairness' to opposing parties, because they have not been deprived of the opportunity to litigate disputed fact issues"].)

As stated, whether issue preclusion applies is a question of law (*Robinson*, *supra*, 4 Cal.App.5th at p. 321), and Suzanne does not dispute the facts establishing it applied here. Indeed, she concedes issue preclusion applied. Thus, even if Craig had not raised his issue preclusion argument before the family law court, the argument is within the exception to the forfeiture rule. Therefore, we agree with both parties that issue preclusion prevented the family law court from determining Craig's spousal support arrears for the period May 2013 through November 5, 2014 and conclude the court erred in doing so.

3. *In Determining Arrears After November 5, 2014, the Family Law Court Incorrectly Included Certain Amounts in Craig's Income, But Otherwise Did Not Abuse Its Discretion*

Craig contends the family law court erred in determining his arrears for the period November 6, 2014 through October 2015 because it did not follow the provision in the judgment requiring Craig to pay monthly support of 20 percent of his "adjusted gross income," as that term was defined in the judgment. Craig suggests the family law court departed from that provision in two ways: (1) The court mistakenly relied on provisions in other written rulings requiring Craig to pay 20 percent of his gross, rather than adjusted gross, income, and (2) the court used Craig's bank statements, rather than his tax returns, to determine the amount of support he owed. Suzanne agrees Craig was required to pay 20 percent of his "adjusted gross income" as defined in the judgment, but disagrees the court departed from that requirement.

To support his first argument, that the family law court mistakenly followed previous rulings requiring him to pay 20 percent of his gross income, Craig points to that portion of the court's statement of decision where, having determined from bank statements that Craig's law firm transferred $387,522 of its income to him during the 30 months ending October 2015, the court stated: "The Judgment awarded [Suzanne] as spousal support 20% of that gross income, or[ ] $77,504.40, and that amount is the amount of arrears in spousal support [Craig] owes [Suzanne]. . . . The amount of spousal support, 20% of gross income, is consistent with [the January 2013 pendente lite

support order] and [the] Statement of Decision of August 14, 2013."[10]

Notwithstanding this reference to orders setting Craig's support obligation at 20 percent of his gross income, the court's statement of decision can be read as giving effect to the controlling provision of the judgment. The judgment defined Craig's "adjusted gross income" to be, as relevant here, his gross income reduced by "(i) all the ordinary and necessary expenses paid or incurred by [Craig] in carrying on . . . [his] law practice" and "(ii) a reasonable reserve for ordinary and necessary expenses that may be paid or incurred by [Craig] in carrying on . . . [his] law practice." In its statement of decision, the court tracked transfers from the bank account of Craig's law firm to his personal bank accounts, which the court treated as income to Craig, and expenses Craig paid from his personal accounts. Throughout, the court noted the lack of evidence establishing Craig paid any business expenses from his personal accounts. Thus, the income the court attributed to Craig did not need reducing to meet the judgment's definition of "adjusted gross income," and the court correctly set Craig's arrears at 20 percent of what it called, perhaps not using the most appropriate term, "*that* gross income" (emphasis added). In short, regardless of how the court phrased its result, the court's analysis shows it determined arrears using Craig's "adjusted gross income."

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10 The August 14, 2013 statement of decision after trial used inconsistent language in setting the amount of Craig's monthly spousal support payment. In at least one place it ordered Craig to pay "20% of his adjusted gross income from all sources," and in at least one other place it ordered him to pay "20% of his gross income from all sources."

Moreover, Craig does not point to any expenses he paid from his personal accounts "in carrying on . . . [his] law practice." Therefore, even assuming the family law court determined his arrears based on the mistaken supposition he owed 20 percent of his gross income, Craig has not shown that error prejudiced him. (See *In re Marriage of Ruiz* (2011) 194 Cal.App.4th 348, 358 [appellant "has not shown that any alternative scheme would have resulted in an allocation more favorable to her and has consequently not met her burden on appeal of demonstrating any prejudice which resulted, assuming that there was error"].)

To support his second argument, that the family law court did not properly apply the judgment's definition of "adjusted gross income," Craig cites the judgment's definition of adjusted gross income as his gross income reduced by ordinary and necessary expenses he paid or incurred in carrying on his law practice "as set forth in [Craig's] federal and state income tax returns." Craig argues that in determining his arrears the court improperly ignored his tax returns, which he contends established he had "no [adjusted gross income] on which to base a support obligation," and instead measured his relevant income "based on bank transfers, thereby capturing funds not subject to the support order" (capitalization omitted).

Craig misunderstands the role tax returns play in the judgment's definition of "adjusted gross income." He repeatedly suggests that the definition makes the corporate tax returns for his law firm the touchstone for determining his personal income and that, because his corporate returns for each year in question showed a net loss, the court at least had to begin with a presumption that he had no personal income on which to base a support obligation. But that is not the role the definition assigns

to tax returns. Importantly, the judgment directed Craig, not his law firm, to pay spousal support, and it set the amount at 20 percent of Craig's, not his law firm's, "adjusted gross income." And in defining Craig's "adjusted gross income" the judgment requires use of his personal tax returns to identify any "ordinary and necessary expenses [he] paid or incurred" in carrying on his law practice, because the definition excludes them.

Moreover, Craig concedes the judgment does not limit the family law court to considering only his tax returns when determining whether he had excludable business-related expenses. Rather, according to Craig, "other records and testimony can be used to rebut the presumption of correctness" of the tax returns. Craig's principal complaint is that the court resorted to such "other records" here without according his tax returns their presumptive correctness. He points to the court's failure to mention, in its statement of decision, the corporate tax returns from his law practice for 2013, 2014, or 2015, all of which he introduced into evidence at the hearing.

Craig does not explain, however, how the court could use the corporate tax returns from his law firm to determine what excludable, business-related expenses he (not the law firm) paid or incurred from his (not the law firm's) income, as the judgment's definition of "adjusted gross income" required. What the court needed were Craig's personal tax returns, which Craig did not put into evidence at the hearing. Under these circumstances, using "other records" in the form of Craig's bank statements to determine his "adjusted gross income" was not an abuse of discretion.

And even now Craig does not reveal or contend what, if any, amount his personal tax returns show he paid or incurred

for ordinary and necessary expenses for carrying on his law practice,[11] much less demonstrate that on this point his personal tax returns contradict the "other records" the court considered. Thus, even if the family law court erred in determining Craig's "adjusted gross income" without the benefit of reviewing his personal tax returns, Craig has not demonstrated any prejudice resulted.

Finally, Craig points to three specific sums he contends the family law court improperly treated as income to him. First, he argues the court improperly included a portion of the $122,783 in income his law firm "earned [in 2013] before commencement of the support order on May 1, 2013." But again, Craig neglects to distinguish his law firm's income from his personal income. The time at which Craig's law firm may have earned money it later paid to Craig is not relevant. What is relevant is when Craig earned it. And demonstrating when the law firm may have earned some portion of the money it later paid to Craig does not establish when Craig earned it.

Second, citing a provision in the judgment excluding receipt of retirement account funds when determining the parties' gross or adjusted gross income for the purpose of making any spousal support order, Craig argues the family law court impermissibly included as income to him funds that were deposited into his law firm account from a retirement account before they were transferred to him. He identifies four such deposits between January 2015 and May 2015, totaling $58,000, and contends the

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11 He merely asserts that the "information" in his personal tax returns, which are not in the record, "was identical to that shown on the [corporate] returns."

court should have excluded that amount from his income when determining his arrears after November 5, 2014. Suzanne concedes the family law court impermissibly included retirement account funds as income to Craig, and she does not dispute that the four deposits he cites were from his retirement account and totaled $58,000. She does suggest the family law court was "not informed" that one of the deposits, for $20,000, was from Craig's retirement account. But the court was aware that any deposited check from a certain financial institution was from Craig's retirement account, and the check in question prominently indicates it was from that institution. Therefore, the family law court erred in including the $58,000 in Craig's income.

Third, Craig argues that the tax returns for his law firm show that it paid him $15,600 in rent for 2014 and $20,224 in rent for 2015 and that these were "reimbursements" the court should not have included as income to him. But Craig does not identify where the court included any such payments as income; i.e., he does not identify any rent payments among the transfers the court counted as income. Nor does he cite any authority for excluding receipt of rents from annual income. (Cf. Fam. Code, § 4058, subd. (a)(1) [in determining child support, annual gross income includes rental income].) The family law court did not abuse its discretion by including these amounts in his income.

4. *The Family Law Court Did Not Err in Ordering Counsel for Suzanne To Calculate Interest on Arrears*

Craig contends the family law court erred in ordering counsel for Suzanne "to provide a calculation . . . of the interest due" on the arrears Craig owed because "the Court cannot

delegate to a nonjudicial officer . . . the power to make binding factual findings." Nothing in the court's order, however, suggests the requested calculation would be a "binding factual finding" or anything other than a proposal to which Craig was free to object and from which the court was free to depart. Indeed, the language of court's order does not support Craig's interpretation: The court did not order counsel to provide "the" calculation of the interest due, but "a" calculation of the interest due. The family law court did not err in directing counsel for Suzanne to provide an interest calculation.

C. *The Family Law Court Did Not Err in Ordering Craig To File Monthly Income Reports*

Craig argues the family law court erred in ordering him to provide a monthly accounting to the court, with a copy to Suzanne, "concerning his gross income from all sources" for the previous month. He contends the court "misapplied the judgment's income reporting requirement and granted relief denied in a final order." The "final order" he refers to is the family law court's denial of Suzanne's May 2014 RFO, which requested the court modify the reporting requirement in the 17-page attachment to the judgment to require Craig to "provide [Suzanne] with a monthly accounting . . . of his gross income and expenses in detailed format for the preceding calendar month, together with a calculation of the monthly spousal support order[ed] to be paid[,] if any[,] with supporting documents[,] which shall include bank statements." In essence, Craig argues that in ordering him to provide monthly income reports the family law court improperly "cho[se] the 2013 [statement of

decision] *over* the Judgment" and impermissibly reconsidered an issue it had already decided.

To the extent Craig's argument requires us to determine the meaning of the family law court's orders or the judgment, he raises a question of law we review independently. (*In re Ins. Installment Fee Cases* (2012) 211 Cal.App.4th 1395, 1429; *In re Norris' Estate* (1947) 78 Cal.App.2d 152, 159.) And in reviewing the order Craig challenges, we review the family law court's "ruling, not its rationale." (*In re Marriage of Boblitt* (2014) 223 Cal.App.4th 1004, 1028.)

The chief problem with Craig's argument is that it rests on the assumption that the statement of decision and the judgment contain inconsistent reporting requirements. They do not. The statement of decision ordered Craig to provide the court a monthly account "concerning his gross income from all sources" for the preceding calendar month. The judgment ordered Craig to provide Suzanne, for any month in which he owed support, a more detailed report: "a statement setting forth in reasonable detail [his] gross income and expenses for the preceding calendar month, and amounts set aside as a reserve during such preceding calendar month, together with a calculation of the amount of Monthly Spousal Support" he owed. These are distinct reporting requirements that do not contradict one another. And because, as Craig concedes, the statement of decision and the judgment must "be taken together, so as to give effect to every part" (Civ. Code, § 1641),[12] both requirements applied all along, i.e., from

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12 "'The same rules apply in ascertaining the meaning of a court order or judgment as in ascertaining the meaning of any other writing. [Citation.] The rule with respect to orders and judgments is that the entire record may be examined to

the time the court entered judgment—notwithstanding that Craig apparently never complied with the reporting requirement in the statement of decision.

The order Craig challenges imposes on him a reporting requirement materially identical to the one in the statement of decision: a monthly account "concerning his gross income from all sources" for the previous month. Thus, the family law court was not "choosing" the statement of decision "over" the judgment. Rather, the court was, in effect, reiterating the requirement that appeared in the statement of decision but not in the judgment. There was no error in that.

Moreover, in her May 2014 RFO Suzanne requested to modify the requirement that appeared in the judgment, seeking to have Craig provide that report every month, regardless of whether he owed support, and to have him include bank statements and other documentation. The court denied that request, but it did not rule the reporting requirement in the statement of decision was inapplicable. Therefore, Craig's argument that the court impermissibly granted relief previously denied in a final order is also without merit.

D. *The Family Law Court Did Not Err in Modifying Spousal Support to a Fixed Amount*

Craig challenges on a number of grounds the family law court's order modifying spousal support to a fixed amount. The

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determine their scope and effect.'" (*Dow v. Lassen Irrigation Co.* (2013) 216 Cal.App.4th 766, 780; accord, *Verner v. Verner* (1978) 77 Cal.App.3d 718, 724.)

trial court, however, did not abuse its discretion in making that order.

1. *Applicable Law and Standard of Review*

"A court may modify a spousal support order upon a showing of a material change of circumstances since the last order. . . . 'In determining whether a change of circumstances has occurred, the trial court is required to reconsider the same standards and criteria set forth in . . . Family Code section 4320 it considered in making the initial long-term order at the time of judgment and any subsequent modification order.' [Citation.] These criteria include, among other things, the earning capacity of each party, the ability of the supporting party to pay spousal support, the needs of each party, the age and health of the parties, the balance of hardships to the parties, and any other factors the court determines are just and equitable." (*In re Marriage of Berman* (2017) 15 Cal.App.5th 914, 920; see *In re Marriage of MacManus* (2010) 182 Cal.App.4th 330, 335 ["the trial court is required to consider and weigh all the factors enumerated in [Family Code] section 4320 to the extent they are relevant to the case"].)

"'The modification of a spousal support order is reviewed on appeal for abuse of discretion. In exercising its discretion, the trial court must follow established legal principles and base its findings on substantial evidence. If the trial court conforms to these requirements its order will be upheld whether or not the appellate court agrees with it or would make the same order if it were a trial court.' [Citation.] [¶] When reviewing for substantial evidence, 'all conflicts must be resolved in favor of the prevailing party, and all legitimate and reasonable inferences

must be indulged in order to uphold the trial court's finding. [Citation.] In that regard, it is well established that the trial court weighs the evidence and determines issues of credibility and these determinations and assessments are binding and conclusive on the appellate court.'" (*In re Marriage of Berman*, *supra*, 15 Cal.App.5th at pp. 919-920.)

2. *The Family Law Court Did Not Abuse Its Discretion in Setting the Amount of Support*

Craig's arguments do not relate to whether there was a sufficient showing of a material change of circumstances, but to whether the family law court abused its discretion in setting the amount of fixed support.[13] Craig first argues the family law court erred in considering under Family Code section 4320, subdivision (c), "[t]he ability of the supporting party to pay spousal support, taking into account the supporting party's earning capacity, earned and unearned income, assets, and standard of living." Specifically, he (again) attacks the court's method of determining his income by tracking his bank transfers. He asserts: "This is not a valid or legally-recognizable measure for determining a party's income from the proprietorship of a business." And he (again) suggests the court should have looked instead to his tax returns.

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[13] Only in passing does Craig comment on the former issue, suggesting the family law court "based its modification on the purported 'difficulty in obtaining the Court ordered accounting,'" rather than on a material change in the parties' circumstances. Reasonably construed, however, the court's statement of decision suggests the court modified support based on a material change in circumstances, including substantial evidence of an increase in Craig's income.

But the only authority Craig cites for his assertion that the court's method of determining his income was improper is Family Code section 4058 and 26 United States Code section 61. The former defines "annual gross income" for purposes of determining child support, not spousal support. (See *In re Marriage of Blazer*, *supra*, 176 Cal.App.4th at p. 1446 [questioning whether that definition "translates to spousal support," recognizing ["'[t]here are no statutes that address the computation of income for the purpose of determining spousal support'" and stating "'there is not yet any authority' applying the child support definition to spousal support"].) But even assuming the statute applies, Craig does not explain how it supposedly precluded the court from determining his income as it did. (See Fam. Code, § 4058 [annual gross income is income from whatever source derived, including but not limited to, other salaries, wages, and "[i]ncome from the proprietorship of a business, such as gross receipts from the business reduced by expenditures required for the operation of the business"].) The same is true for the other statute Craig cites: a provision of the Internal Revenue Code defining "gross income" to include "all income from whatever source derived, including (but not limited to) . . . [¶¶] [g]ross income derived from business." (26 U.S.C. § 61(a)(2).)

Craig's suggestion the family law court should have used his tax returns instead to determine his income is not well taken for reasons already discussed: The relevant returns for determining Craig's income were Craig's returns, not his law firm's returns, and Craig did not introduce his returns into evidence. Moreover, Craig again neglects to identify any specific sums the court incorrectly included as income to him.

Craig next argues the family law court "misapplied" *Marriage of Ostler & Smith*, *supra*, 223 Cal.App.3d 33, which approved awarding spousal support as a percentage of uncertain earnings, because Craig's income was instead "known or readily ascertainable." Craig is presumably alluding to the court's reference to "the previously ordered 20% of gross income" when setting the amount of support. But the court did not set support as a percentage; it set support at a fixed amount. At most, the court used a percentage it considered appropriate to assist in arriving at the fixed amount. This was not an abuse of discretion.

Craig next argues the family law court erred when setting the amount of support because it ignored "the goal that Suzanne become self-supporting within a reasonable period of time" and did not "impute [$29,000 per year] income to her commencing May 1, 2015, as the judgment requires." But the court did consider factors bearing directly on Suzanne's ability to become self-supporting, including evidence she suffered from a number of "diagnosed disorders and conditions." The court found that Suzanne's "medical conditions have worsened significantly since the trial three and a half years ago" and that "[a] vocational examination now four years old . . . and not based upon factual evidence admitted in Court is inapplicable to the present conditions [she] faces." Based on these findings, the court concluded: "It is not appropriate to impute income to [Suzanne] at this time." This modification of the support order in the judgment was within the court's discretion. (See *In re Marriage of Khera & Sameer* (2012) 206 Cal.App.4th 1467, 1476 ["'[a] material change of circumstances may be in the form of unrealized expectations'"].)

Finally, Craig argues the family law court based the amount of support solely on "its math on his purported income" and "refused to consider" other relevant factors under Family Code section 4320, such as his debts and obligations and Suzanne's personal assets. But the statement of decision reflects the court did consider relevant factors under Family Code section 4320 other than Craig's income, including the duration of the marriage, the parties' assets, their health, and the propriety of imputing income to Suzanne. That the statement of decision did not mention the particular debts and assets Craig identifies does not establish the court did not consider them, even assuming they were relevant. (See *In re Marriage of Williamson* (2014) 226 Cal.App.4th 1303, 1318 ["[t]he court is required only to state the ultimate rather than evidentiary facts," and "[t]he statement of decision 'need do no more than state the grounds upon which the judgment rests, without necessarily specifying the particular evidence considered by the trial court in reaching its decision'"]; *In re Marriage of Khera & Sameer*, *supra*, 206 Cal.App.4th at p. 1484 ["[i]t is a fundamental rule of appellate review that a judgment is presumed correct and the appealing party must affirmatively show error"].) No abuse of discretion here.

E. *The Family Law Court Did Not Prejudicially Err in Ordering Craig To Pay Suzanne's Attorneys' Fees*

Craig makes several attacks on the family law court's order directing him to pay $20,301.56 in attorneys' fees and costs. The family law court committed no prejudicial error.

1. *Applicable Law and Standard of Review*

"Pursuant to Family Code sections 2030 and 2032, the trial court is empowered to award fees and costs between the parties based on their relative circumstances in order to ensure parity of legal representation in the action. It is entitled to take into consideration the need for the award to enable each party to have sufficient financial resources to present his or her case adequately. In assessing a party's relative need and the other party's ability to pay, it is to take into account ""all evidence concerning the parties' current incomes, assets, and abilities."" [Citation.] That a party who is requesting fees and costs has the resources is not, by itself, a bar to an award of part or all of such party's fees. Financial resources are only one factor to consider. [Citation.] The trial court may also consider the other party's trial tactics." (*In re Marriage of Falcone & Fyke* (2012) 203 Cal.App.4th 964, 974-975, fn. omitted.)

"In summary, the proper legal standard for determining an attorney fee award requires the trial court to determine how to apportion the cost of the proceedings equitably between the parties under their relative circumstances. [Citation.] In making this determination, the trial court has broad discretion in ruling on a motion for fees and costs; we will not reverse absent a showing that no judge could reasonably have made the order, considering all of the evidence viewed most favorably in support of the order. [Citation.] However, 'although the trial court has considerable discretion in fashioning a need-based fee award [citation], the record must reflect that the trial court actually exercised that discretion, and considered the statutory factors in exercising that discretion.'" (*In re Marriage of Falcone & Fyke*, *supra*, 203 Cal.App.4th p. 975.)

2. *Any Error in the Award of Attorneys' Fees Was Harmless*

Craig first asserts the family law court erred because it determined his ability to pay Suzanne's attorneys' fees based on an erroneous calculation of his income and expenses and did not consider his debts. As discussed, however, Craig has not demonstrated the court's method of determining his income and expenses was improper, and the court's failure to mention Craig's debts in its statement of decision does not establish the court did not consider them. If those debts were a relevant consideration, we presume the family law court considered them, and Craig does not offer a single record citation to rebut that presumption.

Craig next argues the family law court erroneously "refused to determine whether there was a disparity in the parties' ability to pay attorney fees." "Attorney's fees are available under Family Code section 2032 only when there is a 'disparity' in the parties' ability to pay attorney's fees. The statute requires the court to make a finding on the existence of such a disparity."[14] (*Mooney v. Superior Court* (2016) 245 Cal.App.4th 523, 536, italics omitted; accord, *In re Marriage of Morton* (2018) 27 Cal.App.5th 1025, 1050 (*Morton*).)

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[14] Family Code section 2030, subdivision (a)(2), provides in relevant part: "When a request for attorney's fees and costs is made, the court shall make findings on whether an award of attorney's fees and costs under this section is appropriate, whether there is a disparity in access to funds to retain counsel, and whether one party is able to pay for legal representation of both parties. If the findings demonstrate disparity in access and ability to pay, the court shall make an order awarding attorney's fees and costs."

Although the family law court did not make an express finding on the disparity in the parties' ability to pay attorneys' fees, its thorough discussion of the imbalance in their income, assets, and health permits the inference of an implied finding on the issue. (See *Morton*, *supra*, 27 Cal.App.5th at p. 1054 ["disparity in the ability to pay for legal representation is established by[, among other things,] the disparity in the parties' wages and salaries"].) And even assuming Family Code section 2032 required the court to make an express finding (see *Morton*, *supra*, 27 Cal.App.5th at p. 1030 ["a trial court must make *explicit* findings on the issues listed in subdivision (a)(2) of [Family Code] section 2030"]), Craig has not demonstrated the court's failure to do so here prejudiced him (see *Morton*, at p. 1051 [reversal for failure to make an express finding is not automatic; the appellant must demonstrate prejudice].) Given the statement of decision's emphasis on the imbalance in the parties' financial resources, an emphasis that immediately preceded the court's discussion of attorneys' fees, it is not reasonably probable that, "'in the absence of the error, a result more favorable to [Craig] would have been reached.'" (*Ibid.*) Thus, any error in failing to make the required finding was harmless.

Craig's remaining arguments are perfunctory and meritless. For example, he asserts the family law court improperly "intervened on Suzanne's behalf" by telling her she needed a lawyer, but he offers no authority suggesting the advisement was improper. He also complains the award was "*more than twice*" the amount Suzanne had incurred in attorneys' fees. But he ignores evidence in the record reflecting that, through the first day of the three-day hearing on Suzanne's July

2015 and September 2016 RFOs, she had incurred $18,515.56 in attorneys' fees, anticipated incurring another $768 in fees and costs the second day, and would incur additional fees and costs for the final day of the hearing and the post-hearing proceedings.

DISPOSITION

Suzanne's motion to dismiss the appeal is denied. That portion of the family law court's July 13, 2017 order determining Craig's spousal support arrears is reversed and remanded for a determination that excludes the period May 2013 through November 5, 2014 and the $58,000 in retirement funds the court identified as income to Craig. In all other respects the court's July 13, 2017 order is affirmed. Suzanne is to recover her costs on appeal.

SEGAL, J.

We concur:

ZELON, Acting P. J.

FEUER, J.